Court
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No. 00-680

In The

Supreme Court of the United States

THORPE HOLDING COMPANY PROFIT SHARING PLAN, THOMAS A. CARPENTER, and THORPE HOLDING COMPANY,

Petitioners,

v.

SHIRLEY W. STEWART,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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LISTING OF PARTIES TO THE PROCEEDING

The caption to this case contains the names of all parties.

RULE 29.6 STATEMENT

No petitioner has a parent company. No publicly held corporation owns 10% or more of any petitioner's stock.

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INTRODUCTION

Petitioners opened their petition by asking the following question: "When – if ever – may a court legitimately decline to enforce the unambiguous plain language of a statute enacted by Congress?"

Respondent defends the Ninth Circuit's judicial amendment of ERISA by saying that (1) "remedial" statutes must be "liberally" construed; and (2) invoking the rule of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

Respondent takes each of these controversial ideas across new frontiers of judicial legislation. Although the proposition that "remedial" statutes must be "liberally" construed, which a member of this Court has aptly described as "surely among the prime examples of legobabble,"[1] has been used by liberal courts for years to choose among plausible readings of a statute, respondent argues that a court may legitimately use it as a tool to simply read language out of a statute in the service of "remedial" policy goals.

Church of the Holy Trinity, of course, is routinely cited by those seeking to persuade courts to engage in legislation. But the *Holy Trinity* principle is at its most defensible when it is at its most limited – that a court may refuse to enforce the plain language of a statute where enforcement would lead to a patently absurd result. Respondent invokes *Holy Trinity* to defend a far more sweeping result – reading language out of a statute in

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[1] Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1990).

order to avoid a seemingly harsh result towards a single, sympathetic plaintiff.

In a published decision, the Ninth Circuit has abrogated the unambiguous language of ERISA. The court's decision conflicts with a host of decisions on standing under ERISA as well as this Court's well-settled rules for construing statutes. Before additional courts follow the Ninth Circuit's lead, this Court should grant the petition and resolve the important questions presented herein.

ARGUMENT

A. RESPONDENT MISREADS THE TENTH CIRCUIT'S CONSTRUCTION OF THE QDRO REQUIREMENTS IN *HAWKINS*, WHICH DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT'S HOLDING HERE

Respondent denies that the Ninth Circuit's refusal to enforce the QDRO provisions of ERISA based upon the legislative history of the statute conflicts with the Tenth Circuit's decision in *Hawkins v. Commissioner of Internal Revenue*, 86 F.3d 982 (10th Cir. 1996). "The Tenth Circuit's elimination of a relevant QDRO provision," the respondent writes, "demonstrates that the Ninth Circuit's finding of a QDRO does not conflict with *Hawkins*." *Opposition at 8*. The respondent claims that the Tenth Circuit endorsed the Ninth Circuit's view that the QDRO address requirement need not be complied with where "the plan administrator 'clearly possessed that information' independently of the agreement." *Id.*

The respondent misreads *Hawkins*. The Tenth Circuit specifically repudiated the view that a plan administrator's imputed knowledge can excuse the need for a domestic relations order to comply with the plain language of the QDRO provisions: "[W]e do not agree that the QDRO specificity requirements should be construed this liberally." *Hawkins*, 86 F.3d at 992. However, the appellee in *Hawkins* inexplicably failed to raise the issue of non-compliance with the address requirement on appeal, so the Tenth Circuit declined to reverse the Tax Court on that ground.[2]

As recognized in dissent by Judge O'Scannlain, *Petition, App. 38-40*, the Ninth Circuit's opinion squarely conflicts with the Tenth Circuit's opinion in *Hawkins*. This Court should grant the petition and resolve the conflict.

B. THE NINTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH THIS COURT'S WELL-SETTLED RULES FOR CONSTRUING STATUTES

1. The Maxim That Remedial Statutes are Liberally Construed Cannot be Used to Avoid the Plain Unambiguous Meaning of a Statute

The respondent denies that the Ninth Circuit's refusal to enforce the plain language of the QDRO specificity requirements conflicts with this Court's well-settled rules for construing statutes, invoking the venerable

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[2] Nevertheless, the Tenth Circuit's construction of the QDRO specificity requirements is not *dicta*, since the court applied its construction with respect to the remaining three categories of information required by 29 U.S.C. § 1056(d)(3)(C). *Hawkins*, 86 F.3d at 993.

maxim that "remedial statutes are to be liberally construed." *Opposition at 10-12.*

The short answer to respondent's contention, as shown by two cases the respondent herself cites, is that the "remedial statutes" maxim " 'does not give the judiciary license, in interpreting a provision, to disregard entirely the plain meaning of the words used by Congress.' " *Belland v. Pension Benefit Guaranty Corp.*, 726 F.2d 839, 844 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 880; *see Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 857-58 (1st Cir. 1998) (where language is plain, duty of court is to enforce statute according to its terms).

Even if the maxim applied here, it provides a thin reed indeed upon which to rest the Ninth Circuit's decision. Foremost among the many problems with the remedial statutes canon is the unstated assumption that a court has the power to pick and choose among statutes, laying a judicial thumb of unspecified weight on one or the other side of the interpretive scales according to the court's judgment as to whether a statute is "remedial." Even if there were a rough consensus as to what "remedial" means in this context – which there is not – the maxim is so completely indeterminate as to make it little more than a mask for judicial activism. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. at 581-86; *see* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 25-29 (1998 ed.)

2. The *Church of the Holy Trinity* Rule Cannot be Applied Here Because the Result of Enforcing the Plain Language of the Statute Would not be Absurd

The respondent next claims, citing *Church of the Holy Trinity*, that enforcing the QDRO specificity requirements where plan administrators have reason to know the missing information from other sources would be a "patently absurd result." *Opposition at 13.*

The respondent is wrong. In view of Congress' intent to promote certainty and ease of plan administration, *Metropolitan Life Insurance Co. v. Wheaton*, 42 F.3d 1080, 1084 (7th Cir. 1994), thus preserving plan assets for distribution to participants and beneficiaries rather than payment of legal fees, it is entirely plausible to hold that the QDRO status of domestic relations orders must be determined strictly from the four corners of the document: such a rule can be easily understood and efficiently applied by the non-lawyers who frequently serve as ERISA plan administrators, in stark contrast to the subjective rule adopted by the Ninth Circuit. Once courts suggest that the statute may not always mean what it plainly says, expensive litigation is inevitably stirred up, wasting plan assets and frustrating Congress' intent.

The Ninth Circuit's opinion conflicts with this Court's well-settled rules for construing statutes. Neither the maxim that remedial statutes are liberally applied nor the *Church of the Holy Trinity* exception should be used to save the Ninth Circuit's interpretation, which threatens to

frustrate Congress' intent to promote ease of plan administration. This Court should grant the petition and resolve the conflict.

C. THE NINTH CIRCUIT'S HOLDING THAT ADDITIONAL GROUNDS FOR CONCLUDING THAT STEWART LACKED STANDING WERE WAIVED BECAUSE THEY WERE NOT RAISED BEFORE THE DISTRICT COURT IS CONTRARY TO DECISIONS OF THIS COURT AND EVERY OTHER CIRCUIT

The respondent offers three arguments in defense of the Ninth Circuit's holding that additional grounds for finding that Stewart lacked ERISA standing – and the federal court thus lacked subject-matter jurisdiction – were waived because the petitioners failed to raise them before the district court.

First, respondent argues that the question of whether the purported QDRO "clearly specifie[d]" the last known mailing address of participant Richard Nielsen "has nothing to do with Stewart's standing." *Opposition at 15.*

Second, respondent claims that the purported QDRO satisfied the requirements of the statute because it included the address of Nielsen's attorney. *Opposition at 16.*

Finally, respondent argues that the Ninth Circuit correctly found that the petitioners waived the issue of Nielsen's address, relying upon an analogy to the administrative law principle of exhaustion of remedies. *Opposition at 17-18.*

The respondent's first point is frivolous. Only a "participant" or "beneficiary" has standing to bring suit for benefits. 29 U.S.C. § 1132(a). The holder of a QDRO is a "beneficiary." 29 U.S.C. § 1056(d)(3)(J). A domestic relations order is a QDRO only if it "clearly specifies," among other things, the last known mailing address of the participant. 29 U.S.C. § 1056(d)(3)(C). Therefore, the lack of Nielsen's address in the purported QDRO has everything to do with Stewart's lack of standing.

Nor is the plain language of the statute satisfied by the inclusion of the address of Nielsen's attorney. As pointed out by Judge O'Scannlain in dissent, the "statute's pellucid language does *not* . . . permit substitution of the mailing address of the participant's *attorney* for the mailing address of the *participant*." *Petition at App. 34 (Emphasis in original).*

Nor is the respondent's analogy to administrative law principles helpful. What respondent again fails to grasp is that if her domestic relations order is not a QDRO, she has no cause of action under ERISA, and a federal court is without subject-matter jurisdiction. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 817 (1986). A challenge to a federal court's subject-matter jurisdiction cannot be waived. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).[3]

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[3] Neither of the ERISA cases cited by the respondent are to the contrary. Both were suits by plan participants to enforce and clarify their rights under the plans. Both participants had standing pursuant to 29 U.S.C. § 1132(a)(1)(B), and the federal court's subject-matter jurisdiction was unquestioned. *Amato v.*

The decisions of this Court and every circuit establish that (1) a challenge to a federal court's subject-matter jurisdiction cannot be waived; and (2) a district court's decision may be affirmed on any grounds supported by the record. *Petition at 18-19.* The Ninth Circuit's decision conflicts with each of these principles. This Court should grant the petition and resolve the conflict.

D. THERE IS A SPLIT AMONG THE CIRCUITS AS TO WHETHER A PLAINTIFF MAY ESTABLISH STANDING TO SUE UNDER ERISA BY ALLEGING THAT BUT FOR THE ADMINISTRATOR'S PURPORTED BREACH OF FIDUCIARY DUTY, SHE WOULD BE A PARTICIPANT OR BENEFICIARY

The respondent does not deny that a fully mature split among the circuits exists on the important issue of whether a plaintiff may establish standing to sue by the allegation that "but for" the administrator's breach of fiduciary duty, he or she would be a "participant" or "beneficiary." Rather, respondent denies that the Ninth Circuit's opinion adopted "but for" standing. *Opposition at 19-22.*

The respondent misreads the Ninth Circuit's decision. In her briefs, she asked the court to rule that she had standing to sue because but for the petitioners' alleged breaches of their fiduciary duties, she would have

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Bernard, 618 F.2d 559, 561 (9th Cir. 1980); *Kearney v. Standard Insurance Co.*, 175 F.3d 1084, 1086 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 398. Stewart, on the other hand, is not a participant, and without a QDRO, is not a beneficiary either.

obtained a QDRO. *Appellant's Opening Brief at 19-25; Appellant's Reply Brief at 9-11.* The Ninth Circuit accepted respondent's invitation and adopted "but for" standing. *Petition App. 23 (Even assuming order is not QDRO, Stewart has standing because petitioners' alleged breaches of fiduciary duty denied her opportunity to obtain QDRO); 27-29 & n.14 (same).*

Like the plaintiffs in each of the "but for" cases petitioners discussed in their petition, Stewart argues – and the Ninth Circuit held – that Stewart has standing because but for the petitioners' alleged breaches of their fiduciary duties, she would have obtained a QDRO. By respondent's own admission, there is a conflict among the circuits on the issue of whether Stewart's allegation is a sufficient basis for standing. This Court should grant the petition and resolve the conflict.

CONCLUSION

For all the reasons set forth in the petition and above, this Court should grant the petition and resolve the circuit conflicts on the important issues of ERISA standing presented by this case.

Respectfully submitted,

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